Supreme Court, U.S.
FILED
JUL 14 2005
OFFICE OF THE CLERK

No. 04-593

IN THE

Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., and DEBBIE PEAR,
Petitioners,

v.

JOHN MCDONALD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNCONTESTED MOTION TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 2005

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council and The Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* contingent on the granting of the accompanying Motion for Leave.[1] The brief urges reversal of the Ninth Circuit's decision below and thus

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of the brief.

has been filed with the Clerk of the Court. Counsel for Respondent has filed a letter with the Clerk indicating that he does not object to participation by *amici*.

In support of their motion, EEAC and the Chamber by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties.

1. The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound, practical programs and policies to combat employment discrimination. Its membership now comprises more than 330 of this nation's largest private sector companies, collectively employing over 20 million workers throughout the United States.

2. The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing amicus curiae briefs in cases involving issues of national concern to American business.

3. EEAC's and the Chamber's members are fully committed to the principles of nondiscrimination and equal employment opportunity. Nevertheless, as employers, they make tempting targets for lawsuits under the antidiscrimination laws, including 42 U.S.C. § 1981. Consequently, EEAC's and the Chamber's members have a direct interest in the extent to which the universe of potential discrimination suits is limited by the requirement that a plaintiff must have standing to bring an action under Section 1981.

4. EEAC's and the Chamber's members are concerned that the Ninth Circuit's decision in this case vastly expands the scope of standing under Section 1981 by holding that it extends to anyone who claims to have been injured by discrimination in a contractual relationship, even if it is not a contractual relationship to which that individual has ever been, or sought to be, a party. The decision raises the prospect of a flood of Section 1981 suits by plaintiffs alleging discrimination in contractual relationships to which they have been only tangentially related.

5. The brief explains that although Section 1981 was enacted to protect *contractual* rights, the Ninth Circuit has expanded it to encompass derivative claims by individuals against companies with which they have no contractual relationships. Thus, the decision below creates a significant new litigation threat to companies, exposing them to potential discrimination suits brought, not by their own employees or job applicants, but by virtually anyone associated with any firm with which they have had any contractual dealings.

6. Because of their members' interest in the scope of Section 1981 as applied to employment, EEAC and/or the Chamber have filed *amicus curiae* briefs in a number of cases in this Court, including *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), and *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Thus, EEAC's and the Chamber's interest in, and experience with, the issue presented for the Court's consideration in this case are both substantial and long-standing.

7. Because of their significant experience, EEAC and the Chamber are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully request that the Court grant them leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of the brief.

supports the position of the petitioners, Domino's Pizza, LLC, *et al.*

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound, practical programs and policies to combat employment discrimination. Its membership now comprises more than 330 of this nation's largest private sector companies, collectively employing over 20 million workers throughout the United States.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

EEAC's and the Chamber's members are fully committed to the principles of nondiscrimination and equal employment opportunity. Nevertheless, as employers, they make tempting targets for lawsuits under the antidiscrimination laws, including 42 U.S.C. § 1981. Consequently, EEAC's and the Chamber's members have a direct interest in the extent to which the universe of potential discrimination suits is limited by the requirement that a plaintiff must have standing to bring an action under Section 1981.

EEAC's and the Chamber's members are concerned that the Ninth Circuit's decision in this case vastly expands the scope of standing under Section 1981 by holding that it extends to anyone who claims to have been injured by

discrimination in a contractual relationship, even if it is not a contractual relationship to which that individual has ever been, or sought to be, a party. The decision raises the prospect of a flood of Section 1981 suits by plaintiffs alleging discrimination in contractual relationships to which they have been only tangentially related.

Although Section 1981 was enacted to protect *contractual* rights, the Ninth Circuit has expanded it to encompass derivative claims by individuals against companies with which they have no contractual relationships. For example, under the decision below, Company A can be sued by an employee, shareholder or creditor of Company B, where Company B is, was, or at some time sought to be, a customer, supplier or vendor of Company A. Indeed, such individuals—who themselves have no contractual relationship with Company A—can sue Company A alleging that it discriminated against Company B, even if Company B itself does not believe that it has been discriminated against, or has settled any claims it may have had against Company A. Of course, if Company A has not discriminated against Company B, it ultimately may win the case, but only after expending significant resources to defend itself. Thus, the decision below creates a significant new litigation threat to companies, exposing them to potential discrimination suits brought, not by their own employees or job applicants, but by virtually anyone associated with any firm with which they have had any contractual dealings.

Because of their members' interest in the scope of Section 1981 as applied to employment, EEAC and/or the Chamber have filed *amicus curiae* briefs in a number of cases in this Court, including *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), and *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

Thus, EEAC's and the Chamber's interest in, and experience with, the issue presented for the Court's consideration in this case are both substantial and long-standing.

STATEMENT OF THE CASE

This case arose on a complaint filed by John McDonald against Domino's Pizza claiming that McDonald suffered financial loss, emotional distress, and other personal damages as a result of Domino's alleged failure to perform certain obligations under contracts Domino's had with a corporation called JWM Investments, Inc. ("JWM"). The contracts, which called for construction of several restaurants for Domino's in Las Vegas, Nevada, were solely between Domino's and JWM. McDonald was not a party to the contracts, although he was JWM's president and sole shareholder. Nevertheless, McDonald filed this action solely in his own behalf.

McDonald brought this suit under 42 U.S.C. § 1981. His complaint claims that Domino's alleged "refusal . . . to abide my contractual obligations with JWM [was] due to racial animus towards McDonald," who is African-American. Pet. App. 14.[2]

The district court dismissed the complaint on the ground that McDonald lacked standing to sue under 42 U.S.C. § 1981 for an alleged violation of the civil rights of JWM. The court reasoned that "[b]y its terms, section 1981 protects the contractual relationship itself and therefore limits the class of persons who may sue under section 1981 to persons in the contractual relationship." Pet. App. 5. Since McDonald was not party to the contractual relationship between Domino's and JWM, the district court concluded that he could not "step

[2] "Pet. App." references are to the appendix filed with the petition for writ of certiorari.

into the shoes of the corporation and assert [a Section 1981] claim personally." Pet. App. 7.

The Ninth Circuit reversed. The court of appeals held that, even though the Domino's contracts were with JWM and not with McDonald himself, McDonald nonetheless could sue Domino's under Section 1981 for discrimination in the contractual relationship "insofar as he seeks recovery of individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc." Pet. App. 2. The Ninth Circuit essentially acknowledged that its decision conflicts with decisions of other circuits holding that standing under Section 1981 requires a contractual relationship. *Id.* This Court granted Domino's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

As most lower courts, other than the Ninth Circuit, have correctly recognized, a person cannot have standing to sue under 42 U.S.C. § 1981 for alleged discrimination in a contractual relationship to which he is not a party and does not seek to be a party. Section 1981 protects a specific right—the right to make and enforce contracts free from racial discrimination. A plaintiff who has not made, or at least attempted to make, a contract cannot properly claim that any right of *his* under Section 1981 is violated when the defendant rejects, terminates or otherwise interferes with a contract with some third party. If anyone's Section 1981 rights are at stake in this situation, it is the third person's, not the plaintiff's. To accord a plaintiff standing in such circumstances violates, at a minimum, the "general prohibition on a litigant's raising another person's legal rights . . . and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 2309 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

The importance of reaffirming these prudential limitations on standing in the Section 1981 context is underscored by a consideration of the horrendous implications of disregarding them, as the Ninth Circuit did in this case. Contracts are the principal means by which companies do business. Every day, companies throughout the nation propose, accept, reject, modify, amend, enforce, extend, rescind, cancel and terminate literally millions of business contracts. Most of these transactions have potential consequences not only for the immediate contracting parties, but also for others, including shareholders, employees, subcontractors, suppliers, customers, landlords, tenants, creditors, insurers and countless others who do business directly or indirectly with the contracting companies.

When a company loses a business contract, its shareholders may suffer a loss in stock value; its employees may lose work and earnings; firms that do business with it may lose money and opportunities. Although none of these affected individuals was a party to the principal contract, any or all of them could claim to have suffered, to use the Ninth Circuit's phrase, "individual injuries separate and distinct from contract damages suffered by [the company that lost the contract]." Pet. App. 2. Thus, under the decision below, any and all of these individuals could have standing to bring Section 1981 suits against the other company involved, alleging that it acted with discriminatory animus.

Thus, to sustain the Ninth Circuit's holding would, in effect, convert Section 1981 from a guarantee of equal treatment for persons who engage in contractual relationships into an open invitation to file lawsuits by anyone and everyone tangentially related to any soured business transaction that they believe has caused them some loss or harm. This Court should not allow Section 1981 litigation to be expanded so far beyond the zone of interests the statute was designed to protect.

ARGUMENT

I. A PLAINTIFF WHO NEITHER IS, NOR SEEKS TO BE, A PARTY TO A CONTRACTUAL RELATIONSHIP HAS NO STANDING TO SUE UNDER 42 U.S.C. § 1981 FOR ALLEGED DISCRIMINATION IN THAT RELATIONSHIP

A. Because Section 1981 Protects a Specific Right—the Right To Make and Enforce Contracts—the Class of Persons Who Can Bring Claims Under Section 1981 Is Limited to Those Who Seek To Enter Into or Remain In the Contractual Relationship at Issue

Unlike Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, which broadly proscribes discrimination because of race, color, religion, sex, or national origin in all aspects of employment, the statute at issue in this case, 42 U.S.C. § 1981, focuses solely on one specific type of relationship—*i.e.*, the contractual relationship. Section 1981 guarantees individuals the right to "make and enforce contracts" free from discrimination because of race. 42 U.S.C. § 1981(a). This guarantee covers "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). By its own terms, however, Section 1981's protection does not extend beyond the limits of the contractual relationship itself.

The Seventh Circuit put it concisely: "Section 1981 . . . protects the right to enter into and preserve a contractual relationship, period." *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000). "The class of persons who may bring suit [under Section 1981] is therefore limited to persons who actually wish to enter into (or remain in) that relationship." *Id.* at 303. Thus, the Seventh Circuit

concluded that plaintiffs who applied for jobs as "testers" in an effort to detect hiring discrimination, without any intention of actually accepting employment with the defendant-employers, lacked standing to sue under Section 1981, because "in terms of the essential right that section 1981 protects—the right to make and enforce a contract—[the plaintiffs] suffered no injury." *Id.* at 302.

Most other federal appeals courts that have examined this issue have reached the same conclusion as the Seventh Circuit. For example, the First Circuit observed that "[n]othing in section 1981 provides a personal claim . . . to one who is merely *affiliated*—as an owner or employee—with a contracting party that is discriminated against by the company that made the contract." *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999).

The Fifth Circuit likewise concluded that a plaintiff who had no separate contractual relationship with a defendant had no standing to sue under Section 1981 for emotional distress allegedly arising from discrimination against a corporation based on the plaintiff's race, because "the discrimination could only be asserted to invade the legal rights of the corporation and not the rights of the plaintiff." *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 277 (5th Cir. 1997). Like McDonald in the case at bar, the plaintiff in *Bellows* was the president and majority shareholder of the corporation he claimed the defendant had discriminated against. The Fifth Circuit recognized, however, that his claim was "merely derivative" of the corporation's, and hence he had "no individual section 1981 claim." *Id.* at 276. *Accord Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1567 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *orig. opinion aff'd*, 975 F.2d 886 (D.C. Cir. 1992) (President and principal shareholder of computer software firm (CSI), lacked standing to sue health maintenance organization (GHA) for discrimination under Section 1981, "because CSI, rather than

[plaintiff], suffered the alleged injury, as it was CSI that had been party to the contractual relationship with GHA"); *Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (10th Cir. 2002) (President and sole shareholder of retail mall tenant had no standing to sue under Section 1981 for emotional damages she allegedly suffered because of racial discrimination against tenant by landlord and property management firm, since plaintiff suffered no violation of any distinct contractual rights of her own).

B. Alleged Injuries to Persons Who Neither Have Nor Seek a Contractual Relationship Lie Outside the Zone of Interests Section 1981 Protects

In its short, perfunctory opinion below, the Ninth Circuit acknowledged that its "sister circuits" might not agree with its holding that a person can have standing to sue under Section 1981 for discrimination in a contractual relationship to which he is not a party. Indeed, it cited the Tenth Circuit's *Guides* decision as an example of one that "reach[es] a contrary result." Pet. App. 2. Unlike the Tenth and other circuits, however, the Ninth Circuit focused solely on whether the *injury* the plaintiff was claiming to have suffered was separate and distinct from the contract damages allegedly suffered by the contracting party. It failed to complete the necessary analysis by also considering whether the *right* the plaintiff was asserting was one that comes within the zone of interest Section 1981 protects. The Ninth Circuit's earlier decision in *Gomez v. Alexian Bros. Hospital*, 698 F.2d 1019 (9th Cir. 1983), on which it relied in this case, suffers from this same error.

This oversight is fatal to the Ninth Circuit's decisions, because, as this Court has long recognized, it is essential in standing cases to consider not only whether the plaintiff is asserting a distinct injury, but also "whether the constitutional or statutory provision on which the claim rests properly can

be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) (footnote omitted).

The Ninth Circuit failed to recognize that standing involves two distinct questions: First, whether the plaintiffs allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's jurisdiction under Article III of the Constitution, and second, whether as a prudential matter the plaintiffs are proper proponents of the particular legal rights on which they base their suit. *Singleton v. Wulff*, 428 U.S. 106 (1976). The Ninth Circuit considered only that McDonald alleged distinct personal injuries, without considering the specific scope of the statute under which he was suing.

The Seventh Circuit's opinion in *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 289 (7th Cir. 2000), illustrates a proper analysis of the Section 1981 standing issue and, by comparison, reveals the incompleteness of the Ninth Circuit's approach. The Seventh Circuit acknowledged that the plaintiff "testers" in *Kyles* were alleging individual injuries that were separate and distinct to them—*i.e.*, humiliation and other emotional distress as a result of having allegedly encountered discrimination. 222 F.3d at 302. But unlike the Ninth Circuit, the Seventh Circuit recognized that a valid Section 1981 standing analysis cannot end there. Rather, the Seventh Circuit recognized the need to go further and consider whether the plaintiffs' alleged injuries were of a kind that is cognizable under Section 1981. It properly determined that they were not, because "in terms of the essential right that section 1981 protects—the right to make and enforce a contract—[the plaintiffs] suffered no injury." *Id.* Hence, the Seventh Circuit correctly concluded that the *Kyles* plaintiffs had no standing to assert claims under Section 1981.

Had the Ninth Circuit completed the necessary analysis in this case, it would have reached the same conclusion. Since McDonald had never made nor attempted to make any contract in his individual capacity with Domino's, he could not claim an injury within the zone of interests sought to be regulated by Section 1981. Therefore, he lacked standing to sue under that statute.

II. PRUDENTIAL PRINCIPLES WEIGH HEAVILY AGAINST EXTENDING SECTION 1981 STANDING TO PERSONS WHO ARE ONLY TANGENTIALLY RELATED TO THE CONTRACTUAL RELATIONSHIPS ON WHICH THEY BASE THEIR CLAIMS

A. The Party Whose Section 1981 Rights Are at Stake Is Best-Suited To Assert Any Section 1981 Claim

As noted above, a proper analysis of standing does not end with a determination that a plaintiff has alleged an "injury in fact" sufficient to raise a justiciable controversy under Article III. For even when the Constitution's requirements are satisfied, courts use "prudential principles" to "limit access to the federal courts to those litigants best suited to assert the particular claim." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). Such principles are reflected in the "general prohibition on a litigant's raising another person's legal rights," as well as in "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, __, 124 S. Ct. 2301, 2309 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Indeed, this Court has recognized repeatedly that, to have standing, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S.

at 499. The practical necessities behind this rule are detailed in the Court's opinion in *Singleton*, 428 U.S. at 113-16. Those considerations weigh heavily against extending standing under Section 1981 to plaintiffs who have no contractual relationship with the defendant they are suing, but claim to have been harmed by the defendant's treatment of some company with which they are affiliated as, for example, employees or shareholders.

This Court explained in *Singleton* why "[f]ederal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of rights of third persons not parties to the litigation." 428 U.S. at 113. It noted, first, that "courts should not adjudicate . . . rights unnecessarily, and it may be that in fact the holders of [the rights in question] either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Id.* at 113-14.

These concerns are clearly warranted in cases, like the one at bar, where Company A is sued by an employee or shareholder of Company B, who claims that Company B was discriminated against by Company A, with which Company B had a contractual relationship. Company B may not believe that it has been discriminated against, or even if it does, it may still wish to do business with Company A. For any number of valid reasons, Company B may conclude that its business interests will be best served by resolving any differences it may have had with Company A through nonjudicial means, or simply letting them pass and moving on.[3] In any event, the last thing Company B is likely to want in this situation is a lawsuit by its employees or shareholders

[3] Here, for example, according to the parties' briefs to the court of appeals, JWM settled its claims against Domino's before its employee and shareholder, McDonald, brought this suit in his own name. Plaintiff-Appellant's Opening Brief at 4; Defendants-Appellees' Answering Brief at 4.

claiming that Company A has discriminated against it. Company A may be far less likely to settle or continue doing business with Company B if it remains open to potential suits by employees, shareholders or others claiming to have been harmed by its alleged violation of Company B's rights. Thus, to allow such third-party suits would effectively take control of the right guaranteed to Company B by Section 1981—the right to make and enforce contracts—out of Company B's hands.

Second, as the Court went on to observe in *Singleton*, the "parties themselves usually will be the best proponents of their own rights." *Id.* at 114. Again, this is certainly true in Section 1981 actions. It is well-established that Section 1981 claims require proof of discriminatory intent. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982). A plaintiff generally must be prepared to prove that a defendant's proffered explanation for terminating a contract or rejecting a contract proposal is a pretext to cover racial bias. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[4] In the business context, this typically requires an understanding of business conditions, objectives and strategies better known to the contracting parties themselves than to any non-party.

"The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most

[4] The Court held that the scheme of proof for intentional discrimination claims under Title VII also applies to Section 1981 claims. *Patterson*, 491 U.S. at 186. Thus, once a plaintiff has established a *prima facie* case of discrimination and the defendant has proffered a legitimate, nondiscriminatory reason for its action, the plaintiff must prove by a preponderance of the evidence that the reasons articulated by the defendant were pretextual and that the defendant's real motives were discriminatory. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

effective advocates of those rights are before them." *Singleton*, 428 U.S. at 114. Company B, having participated directly in contractual dealings with Company A, generally will be in a better position than any non-party to those transactions to know the facts and circumstances surrounding any breakdown that may have occurred in the parties' relations. Company B also will be more likely than any outsider to have access to relevant documents and information. Thus, Company B likely will be a more effective advocate of its own rights under Section 1981 than any employee, shareholder, or other person who was not a party to the contractual dealings at issue.

Indeed, to allow plaintiffs to bring suits based on other parties' rights not only impairs the quality of advocacy in the courts, but also may directly harm the interests of the persons whose rights actually are at stake. For example, an inquiry into the reasons why Company B's contractual relations with Company A turned sour may require exploration of matters Company B would prefer for strategic or competitive reasons to keep confidential. Clearly, whether to launch a Section 1981 action that inevitably will lead to such an inquiry should be up to Company B alone, not to some third person pursuing his or her own agenda.

B. Prudent Concern for the Amount of Litigation in the Federal Courts Warrants Limiting Standing Under Section 1981 to Those Whose Own Rights Are at Stake

Finally, controlling the sheer quantity of litigation in the federal courts is a legitimate, prudential consideration for courts to take into account when deciding how far to extend the boundaries of standing under a statute such as Section 1981, which contains no "language suggesting that Congress meant to stretch standing to the limits of Article III." *Kyles*, 222 F.3d at 303. Viewed in that light, the potential implications of the Ninth Circuit's holding in this case are beyond breathtaking; they are truly appalling.

Indeed, even under the view of the majority of Circuits that Section 1981 standing is limited to the actual parties to a contractual relationship, the number of potential litigants is huge, given that every contract has at least two parties and every instance of discrimination in the "making, performance, modification, [or] termination" of a contract, or in the "enjoyment of all benefits, privileges, terms, and conditions" of a contractual relationship of any sort, constitutes an actionable event. 42 U.S.C. § 1981(b).

Under the Ninth Circuit's holding, however, each actionable event gives rise to a virtually infinite number of potential litigants. For under that holding, the potential litigants include anyone and everyone who can claim to have suffered some distinct injury because of an actionable event—*e.g.*, every employee who can claim to have lost wages because his employer lost a contract with another company; every shareholder who claims to have lost dividends or share value; every creditor who claims to have been prevented from collecting a debt; and everyone who claims to have suffered emotional distress due to a disruption in one company's contractual relations with another. The list could go on indefinitely.

There is simply no evidence that when Congress enacted Section 1981, it meant to open the federal courts to suits by persons whose only claim is that they have suffered as a result of a violation of some *other* person's right to make and enforce contracts. This Court should not open the doors now to such tangential claims, but should adopt the view of the majority of lower courts that the class of persons who can bring claims under Section 1981 is limited to those who actually seek to enter into or remain in the contractual relationships at issue.

CONCLUSION

For the reasons stated above, this Court should reverse the Ninth Circuit's decision in this case.

Respectfully submitted,

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July 2005

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